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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 766

MAX JAKOB, PETITIONER

v.

UNITED STATES OF AMERICA

No. 973 MISC.

MILTON PARNESS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A)[1] is reported at 366 F. 2d 853.

[1] "Pet. App." refers to the Appendices to the petition in No. 766.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1966. Mr. Justice Harlan extended the petitioners' time for filing petitions for writs of certiorari to November 11, 1966 (a holiday). Petitioner Jakob filed his petition on that date, and petitioner Parness filed his petition on November 12, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Both petitioners present the following question:

1. Whether the inadvertent failure of the government to turn over to the defense minutes of the grand jury testimony of one witness, whose testimony was of minimal significance, requires reversal of the convictions.

Petitioner Jakob (No. 766) raises the following additional question:

2. Whether a comment by the prosecutor during summation that certain evidence was "uncontradicted" constitutes reversible error.

Petitioner Parness (No. 973 Misc.) presents the following additional questions:

3. Whether his previous conspiracy conviction barred his prosecution for the conspiracy charged here.

4. Whether the court properly admitted evidence relating to incriminating statements recorded (by a monitoring device installed in the hotel room of an

undercover F.B.I. agent) in the course of petitioner's attempt to sell stolen securities to the agent.

5. Whether the invocation of the privilege against self-incrimination by a government witness resulted in reversible error.

STATEMENT

Petitioners were convicted in the United States District Court for the Southern District of New York of transporting stolen securities in interstate commerce in violation of 18 U.S.C. 2314, 2315, and of conspiring to do so in violation of 18 U.S.C. 371. On December 16, 1965, petitioner Jakob was sentenced to imprisonment for one year and one day on both counts, the terms to run concurrently, and was fined $10,000 on each count. Petitioner Parness was sentenced to imprisonment for four years on each count, the terms to run concurrently. The court of appeals affirmed.

The evidence (the sufficiency of which is not challenged here) showed that petitioners, fourteen co-defendants and other co-conspirators were engaged in a scheme to dispose of about one million dollars worth of securities stolen from the brokerage firm of Bache & Co. The facts are summarized in considerable detail in the court of appeals' opinion (Pet. App. A–10 to A–29). Briefly, the evidence revealed that, by various means and in concert with various other co-conspirators, both petitioners agreed to distribute the stolen stock and engaged in efforts to effect its distribution.

The conspiracy terminated as the result of events in the latter part of July 1962. After learning that a "big buyer" from the West Coast was interested in purchasing a large portion of the securities, co-defendant Gladstone communicated with petitioner Jakob and another defendant (J.A. 369–370)[2] and arrangements were subsequently made for a meeting with this "buyer" (J.A. 272–274, 348–349). On July 20, F.B.I. agent DeSena, posing as the buyer from the West Coast, took a room at the Robert Treat Hotel in Newark, New Jersey. That afternoon, he was visited in his room by petitioner Parness, co-defendants Lombardozzi and Martinelli, and co-conspirator Clott. After some negotiations about price, petitioner Parness left the room in order to obtain the securities (G. 56–57, 85–86). Shortly thereafter, co-defendant Carbone entered the room with eighteen of the stolen one-hundred-share certificates, having a face value of approximately $176,000 (G. 58–60). After DeSena left, obstensibly in order to return with full payment, other federal agents, who had monitored the conversations through a listening device in agent DeSena's room, entered the room and arrested Lombardozzi and Martinelli. Other members of the conspiracy were apprehended on later dates.

ARGUMENT

At trial, co-defendant Gladstone testified that, on July 19, 1962, he met co-defendant Clott on a street

[2] The designation "J.A." refers to the appendix for petitioner Jakob, "G." to the government's appendix, "Tr." to the trial transcript, which we are lodging with the Clerk of this Court, and "Ex." to petitioner Parness' Exhibit B.

corner; that they proceeded to co-defendant Sessler's office building; that, while Clott waited on the street, he went in and got from Sessler a list of stocks to be offered the West Coast buyer; and that he then rejoined Clott and gave him the list (J.A. 346). F.B.I. agent McDonald corroborated this evidence by his testimony that he had observed Gladstone and Clott meet on the corner and that he saw Gladstone enter the building and thereafter rejoin Clott (Pet. App. A–54 to A–58).

Approximately three weeks after trial, grand jury testimony of McDonald was discovered by the United States Attorney in another file which was being prepared for the prosecution of two other defendants. Immediately upon discovery of this testimony, a letter was sent to the trial judge (Pet. App. A–47), and the testimony was forwarded to his chambers. This testimony, which was turned over to the defense prior to being sealed for purposes of appeal, contained insignificant differences from the agent's trial testimony.[3] On motions to set aside the verdict, the trial court denied relief on the ground that, even if McDonald's testimony were completely discredited, it would have no effect upon the verdict (G. 69–70). The court of appeals affirmed that ruling.

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[3] Before the grand jury, McDonald said that Gladstone met Clott on the southeast corner of the intersection; at trial he stated it was the northeast corner. His description, before the grand jury of the man with Clott was "approximately forty years of age, five-eight, a hundred-sixty, a hundred-seventy pounds." His description at trial was "about 45 years of age, five-ten, five-eleven, 175 to 180 pounds." In both instances, McDonald definitely identified the man in question as Gladstone. See Pet. App. A–49, A–55.

Agent McDonald's testimony, merely corroborating the fact that Gladstone and Clott met, was of minimal significance at the trial. Hence the inadvertent error in failing to turn over the grand jury testimony does not require reversal of petitioners' convictions. Petitioners have failed to show that any prejudice may have resulted from their lack of access to McDonald's grand jury testimony. The case is thus wholly unlike the situation in *Dennis* v. *United States*, 384 U.S. 855, where the court had refused to turn over the grand jury testimony of important government witnesses. In the present circumstances, the ruling of the lower courts was clearly correct. See *Rosenberg* v. *United States*, 360 U.S. 367; *United States* v. *Kahaner*, 317 F. 2d 459, 473 (C.A. 2), certiorari denied, 375 U.S. 836 (harmless error in failing to turn over Jencks Act material).[4] As this Court noted in *Rosenberg*, where, as here, the information not presented to the defense at trial is patently insignificant, the courts are not required to overturn the conviction.

2. In the closing argument, government counsel said (Pet. App. A–59):

> When Mr. Gelb summed up he said that he was going to address himself to the highlights and he was going to skip the detail. Well, I submit to you what he very nicely skipped were the incriminating details, the details

[4] Two of the cases relied on by petitioners for the view that the harmless error rule does not apply in cases such as this (Pet. App. E) were decided before this Court's decision in *Rosenberg*. The third, *United States* v. *Sheer*, 278 F. 2d 65 (C.A. 7), involved the erroneous withholding of Jencks Act statements of two crucial government witnesses.

> showing Max Jakob's knowing participation in this scheme. He forgot to mention, for instance, that William Gladstone testified, *uncontradicted,* that he, Gladstone, told Jakob on or about July 2nd—[Emphasis added].

Jakob's attorney interrupted and moved for a mistrial on the ground that government counsel made reference to the failure of Jakob to take the stand. The motion was denied, and the court, without objection, charged the jury (Pet. App. A–59–A–60; G. 66–67):

> Members of the jury, tomorrow, when I give you my instructions, I will have occasion to tell you a defendant has the absolute right not to testify and that you are not to draw any inference unfavorable to the defendant by his failure to testify. Now if Mr. Stillman's suggestion was designed—and I don't think it was; I certainly think it was unintentional—to ask you for an inference unfavorable to Mr. Jakob because the testimony to which he referred of Mr. Gladstone was uncontradicted, I will have to tell you to disregard it and to draw no such inference. We will cover it tomorrow in our instructions. That is enough for the present.

The comment by the government counsel does not warrant reversal of Jakob's conviction. The rule which prohibits comment on the defendant's failure to testify in his own behalf does not forbid argument to the effect that the evidence is "uncontradicted", unless it is shown that the argument was manifestly intended to comment on the defendant's failure to testify. *Smith* v. *United States,* 234 F. 2d 385, 389

(C.A. 5); *Knowles* v. *United States*, 224 F. 2d 168, 170 (C.A. 10); *Garcia* v. *United States*, 315 F. 2d 133 (C.A. 5). No such showing was made here. Moreover, the court's clear instruction to the jury obviated any possible prejudice. *United States* v. *Stromberg*, 268 F. 2d 256, 271 (C.A. 2), certiorari denied, 361 U.S. 863; *United States* v. *De Vasto*, 52 F. 2d 26 (C.A. 2), certiorari denied, 284 U.S. 678; *Sterling* v. *United States*, 333 F. 2d 443, 449–450 (C.A. 9). Petitioner's argument that the court's charge improperly emphasized his failure to testify in his own behalf (see *Stewart* v. *United States*, 366 U.S. 1, 9–10) is insubstantial and, in any event, comes too late, since petitioner failed to object to these curative instructions.[5]

3. Petitioner Parness contends that he was previously convicted on Count 1 of the indictment—the conspiracy charge—and thus, that the present proceeding placed him twice in jeopardy for the same offense. In the trial below, Parness was convicted on both the conspiracy count and the substantive count of interstate transportation of stolen property, and the sentences were ordered to run concurrently. Since petitioner does not, and cannot, challenge his conviction on the substantive count on double jeopardy grounds, there is no need to review the validity

[5] Petitioner Jakob appears to suggest (Pet. 6) that an exception was taken to the court's curative instructions. It is clear, however, that the exception taken was only to the denial of a motion for a mistrial (see Pet. App. A–59). In any event, there was surely no specific exception (as required by Fed. R. Crim. P. 30) on the ground that the instruction unduly called attention to petitioner's failure to testify.

of the conviction on Count 1. *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Lawn* v. *United States*, 355 U.S. 339.

In addition, this contention is without merit. Petitioner was previously convicted in the United States District Court for the District of New Jersey on an indictment charging that he and one J. Tom Grimmett, from June 1961 to March 1962, conspired with each other and with other persons to violate 18 U.S.C. 2314.* The indictment further stated (Ex. 7):

> It was further a part of the aforesaid conspiracy that approximately $1,000,000 of stolen securities would be sold by MILTON PARNESS and others * * * to J. TOM GRIMMETT and would be forged, altered, counterfeited and then pledged as collateral for loans.

In response to a bill of particulars (Ex. 11), however, the government limited the scope of the conspiracy count charged in the indictment to an agreement to transport approximately $50,000 of securities stolen from the homes of Bernard Hans and Fred W. Plate, between New York City, East Paterson, New Jersey, and Oklahoma City, Oklahoma (Ex. 12–13). There was evidence introduced at the New Jersey trial that Parness was said to have a batch of securities, valued at approximately $1,000,000, available for sale on the open market on January 2, 1962 (*e.g.*, Ex. 96, 110, 112, 222, 224–225, 333). It is on the basis of this evidence that Parness claims that the subject matter of both

* The court of appeals affirmed *per curiam* (331 F. 2d 703), and this Court denied certiorari. *Parness* v. *United States*, 377 U.S. 993.

trials was the same and that there was but one conspiracy, commencing on June 1, 1961, and terminating upon return of the present indictment.

After comparing the indictment and the evidence produced in the present proceeding with the charge and evidence in the former, the courts below found Parness' double jeopardy claim to be without merit. This ruling was clearly correct. Parness was not tried in the New Jersey trial for conspiring to transport $1,000,000 of stolen securities. Rather, he was tried and convicted of conspiring to transport the $50,000 of securities stolen from the homes of Hans and Plate—a separate and distinct offense from that involved here. Even if $1,000,000 of securities could be said to have been involved in the New Jersey case, it is clear that that conspiracy was different from the one involved in this case. In the New Jersey case, it was established that Grimmett was the intended distributee of the stolen securities; that the intended date of distribution was January 2, 1962; and that the interstate transportation involved shipment between New York City, East Paterson, New Jersey, and Oklahoma City, Oklahoma. Here it was proved that Parness' intended distributees were Jakob, Gladstone and Sessler; that the conspiracy contemplated distribution in June and July 1962; and that the interstate transportation involved shipment from New York City to Newark, New Jersey. Parness failed to meet his burden of showing that the two trials involved the same conspiracy. *Sanchez* v. *United States*, 341 F. 2d 225, 227 (C.A. 9); *Reid* v. *United States*, 177 F. 2d 743, 745 (C.A. 5).

4. When Agent DeSena posed as the buyer from the West Coast, the F.B.I. rented two adjoining rooms at the Robert Treat Hotel. A microphone was placed in DeSena's room and recording equipment was placed in the adjoining room. When Parness attempted to sell stolen securities in DeSena's room, the entire conversation, including incriminating statements made by Parness (G. 79–91), was recorded by agents next door. At trial, agent DeSena testified to these circumstances, without objection, and the transcript of the recording was thereafter offered into evidence.

Petitioner Parness contends that the incriminating statements, to which DeSena testified, were obtained in violation of his Sixth Amendment right to counsel, and that therefore the statements were inadmissible into evidence. Since petitioner failed to object to the testimony of DeSena, he cannot now raise that issue on appeal. *United States* v. *Indiviglio*, 352 F. 2d 276, 279 (C.A. 2), certiorari denied, 383 U.S. 907. In any event, there is no merit to petitioner's contention. That Parness was under indictment for the conspiracy which was the subject of his New Jersey trial (*supra*, pp. 8–10) at the time his statements in DeSena's hotel room were recorded is not material. The recordings were not introduced in the New Jersey trial, and the statements recorded in no way related to the other conspiracy. Rather the statements revealed Parness' complicity in the scheme to dispose of the Bache securities. Parness was not under indictment for his role in the Bache conspiracy at the time

of his conversation with DeSena; indeed the fact of his complicity was not then known by the government. The recorded statements were not merely admissions of previous criminal conduct; they were part and parcel of an aborted attempt to fulfill the objects of the Bache conspiracy. The decisions relied on by petitioner[1] prohibit only the eliciting of incriminating statements from an accused, under certain circumstances, about a crime which he is charged with, or suspected of, having committed; they do not bar the prevention and detection of subsequent crimes.

Petitioner further argues that the introduction of the tape recording of his conversation violated his Fourth Amendment rights. This recording, however, which corroborated DeSena's testimony at trial, was clearly admissible. *Osborn* v. *United States,* No. 29, this Term (decided December 12, 1966); *Lopez* v. *United States,* 373 U.S. 427. The conversation was recorded with the consent of the occupant of the room [DeSena], and the tape recording served only to support the credibility of DeSena by corroborating his testimony as to the substance of the conversations. Cf. *Lopez* v. *United States,* 373 U.S. 427, 442 (Warren, C.J., concurring in result). Indeed, the present case is stronger than either *Osborn* or *Lopez,* for here there is no possible question as to the legality of an entry onto the property of the defendant. Petitioner voluntarily entered a room rented and occupied by DeSena. Clearly, in these circumstances "the use by [the agent] of a device to make an accurate record of

[1] *Massiah* v. *United States,* 377 U.S. 201 *Escobedo* v. *Illinois,* 378 U.S. 478; *Miranda* v. *Arizona,* 384 U.S. 436.

a conversation about which [he] later testified" did not violate petitioner's constitutional rights. *Osborn v. United States, supra,* slip opinion, p. 4.

5. On the second day of trial, Gordon Tallman (who had previously been convicted of larceny in connection with the Bache securities) was called as a witness for the government. The following colloquy then occurred (J.A. 64):

> Mr. TALLMAN: If it please the court, I don't plan on giving testimony in this case.
>
> The COURT: You refuse to take the oath?
>
> Mr. TALLMAN: Yes, sir.
>
> The COURT: I direct that you to take the oath.

* * * * *

After this admonition, the witness took the oath, and the jury was excused. A hearing was held, in which it was determined that the witness could properly invoke the privilege against self-incrimination (J.A. 74–76). After being recalled, the jury was then instructed (J.A. 77; G. 20):

> The second witness called yesterday has been excused by order of the court. You are not to draw any inferences from that fact of any sort, either for or against the government or for or against any defendant now on trial.

Petitioner Parness contends that, through the actions of Tallman, the government laid the groundwork for an inference—that the stock was stolen—which was critical to a successful prosecution, particularly when the prosecutor, in his closing statement, stated that "Tallman went to jail for stealing the stock" (Pet. 31). However, Tallman was not asked any questions,

and the jury was never informed on what basis the witness was excused.[8] Moreover, there was plainly sufficient testimony by an employee of Bache & Co. that the stock was stolen (G. 62–66). Finally, we point out that the comment by the prosecutor that "Tallman went to jail for stealing the stock" came only after counsel for defendant Edwards had stated in summation that Tallman had been "arrested by the District Attorney's office for stealing the securities" and had served time in prison, and that the "thief ha[d] been punished" (Tr. 2993–2994).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1967.

[8] Counsel for petitioner requested the court explicitly to inform the jury on what basis the witness was excused. Finding this suggestion to be highly detrimental to the defense, the court refused to give such instructions unless all parties joined in the application. The application was later abandoned (G. 18–19).

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